APPENDIX A

SUPREME COURT OF MISSISSIPPI
Court of Appeals of the State of Mississippi
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June 14, 2007

This is to advise you that the Mississippi Supreme Court rendered the following decision on the 14th day of June, 2007.

Supreme Court Case # 2006-CA-00024-SCT
Trial Court Case # CVO4-281AA

Tammy Smith by and through Her Father & Next Friend, Alvin Christopher Smith v. Captain D's, LLC

Reversed and Remanded. Appellee taxed with costs of appeal.

* NOTICE TO
CHANCERY/CIRCUIT/COUNTY COURT CLERKS *

If an original of any exhibit other than photos was sent to the Supreme Court Clerk and should now be returned to you, please advise this office in writing immediately.

[Received JUN 15, 2007]

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2006-CA-06024-SCT

TAMMY SMITH by and through her father & next friend, ALVIN CHRISTOPHER SMITH,

v.

CAPTAIN D's, LLC.

DATE OF JUDGMENT:
12/21/2005
TRIAL JUDGE:
HON. SHARION R. AYCOCK
COURT FROM WHICH APPEALED:
ALCORN COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:
DUNCAN L. LOTT
ATTORNEY FOR APPELLEE:
BRADLEY FAREL HATHAWAY
NATURE OF THE CASE:
CIVIL - PERSONAL INJURY
DISPOSITION:
REVERSED AND REMANDED - 06/14/2007
MOTION FOR REHEARING FILED:
MANDATE ISSUED:

EN BANC.

CARLSON, JUSTICE, FOR THE COURT:

Tammy Smith, by and through her father and next friend, Alvin Christopher Smith, sued Captain D's, LLC, in the Alcorn County Circuit Court for negligent hiring, supervision, and retention based upon alleged rape by a supervisor. The trial judge granted Captain

D's motion to compel arbitration and dismissed all of Tammy's claims against Captain D's. Tammy appeals, requesting that this Court reverse the trial court's grant of Captain D's motion to compel arbitration and dismissal of her lawsuit, and remand this case to the trial court for a full trial on the merits. Upon careful consideration of the issues presented, we agree with Tammy and thus reverse the trial court's grant of Captain D's motion to compel arbitration and dismissal of Tammy's claims, and we remand this case to the trial court for further proceedings consistent with this opinion.

FACTS AND PROCEEDINGS IN THE TRIAL COURT

On February 3, 2004, Tammy Smith (Tammy), then seventeen years old, along with her grandparents[1] visited Captain D's restaurant[2] in Corinth. While they were eating, Tammy's grandmother, saw her friend, Peggy Jones (Jones), a manager of Captain D's. She approached Jones for an employment application for Tammy. Jones retrieved an employment application and delivered it to Tammy's grandmother. After eating, Tammy and her grandparents left the restaurant with the application.

At home, Tammy filled out the application for employment, which included a single-page arbitration agreement entitled "CAPTAIN D'S EMPLOYMENT DISPUTE RESOLUTION PLAN."[3] The agree-

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[1] In July, 2003, Tammy moved in with her grandparents for personal reasons that need not be discussed here.

[2] Captain D's is a seafood restaurant owned and operated by Captain D's, LLC.

[3] There is evidence in the record indicating that Tammy and her grandmother may have actually signed the one-page arbi-

ment required both Captain D's and Tammy to submit claims between them to binding arbitration. The agreement stated that if Tammy did file a lawsuit, Captain D's could use the agreement to dismiss the lawsuit and compel arbitration.

Jones would later testify that she told Tammy that her grandmother had to sign the agreement because Tammy was a minor. Tammy signed the arbitration agreement as the applicant and her grandmother signed on the line provided for a guardian.[4]

On August 17, 2004, Tammy filed suit in the Alcorn County Circuit Court against Captain D's and Christopher Lee Howell (Howell),[5] alleging that Howell, a manager of Captain D's, assaulted and raped her during working hours. Tammy's complaint asserts that Captain D's was negligent in its hiring, supervising, and retention of Howell.

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tration agreement while at the restaurant. Captain D's arbitration plan consisted of the single-sheet agreement and a 32-page informational booklet describing the agreement. Jones testified in her deposition that she was unsure of whether the copy of the booklet she gave Tammy was the December 2003 version or the revised, February 2004 version.

[4] Tammy argues that her grandmother was not her court-appointed guardian and, thus, did not have the authority to sign the arbitration agreement as Tammy's guardian, thereby rendering the agreement ineffective. Captain D's argues that, even if Tammy's grandmother was not Tammy's court-appointed guardian, she was acting *in loco parentis*. Because this has no effect on our decision, we choose not to address this issue today.

[5] Howell proceeded pro se, and he is not a party to this appeal. He answered the lawsuit in the trial court, but did not join in Captain D's motion or otherwise move to compel arbitration.

On September 16, 2004, Captain D's filed a Notice of Election of Binding Arbitration, Motion to Dismiss Complaint and to Compel Arbitration, and Alternative Motion to Dismiss Based on the Exclusive Remedy of the Mississippi Workers' Compensation Act and Separate Answer Subject to Motions to Compel Arbitration and to Dismiss. Tammy responded by, inter alia, objecting to arbitration.

The issues were joined and a hearing was held on May 3, 2005, Judge Sharion Aycock, presiding. Judge Aycock subsequently entered a Memorandum Opinion on December 14, 2005, granting Captain D's motion to compel arbitration and dismissing Tammy's claims against Captain D's in the circuit court. A final judgment consistent with the memorandum opinion was entered on December 28, 2005.

Tammy submitted her Petition for Interlocutory Appeal to this Court, requesting interlocutory review of the trial court's final judgment. On February 15, 2006, this Court found that final judgment had been entered as to Captain D's pursuant to Miss. R. Civ. P. 54(b), and further found that Tammy's petition for interlocutory appeal should be treated as a timely filed notice of appeal from a final judgment.

DISCUSSION

A trial court's grant or denial of a motion to compel arbitration is a question of law; therefore, we apply a de novo standard of review on appeal. *Howard v. Estate of Harper*, 2006 Miss. LEXIS 626, *3 (Miss. 2006) (citing *Sennett v. United States Fid. & Guar. Co.*, 757 So. 2d 206, 209 (Miss. 2000)); *Pre-Paid Legal Servs. v. Battle*, 873 So. 2d 79, 82 (Miss. 2004) (citing *Russell v. Performance Toyota, Inc.*, 826 So. 2d 719,

721 (P 5) (Miss. 2002)). *See also East Ford, Inc. v. Taylor*, 826 So. 2d 709, 713 (Miss. 2002).

Tammy presents three issues to be decided in today's case: (1) whether a minor may disaffirm an arbitration agreement based on the infancy doctrine; (2) whether the arbitration agreement is unconscionable; and (3) whether the right to arbitration is precluded by the assertion of an alternative affirmative defense. However, finding one issue to be dispositive, we restate the critical issue for clarity in discussion.

WHETHER THE PARTIES AGREED TO ARBITRATE

In the appellant's brief, Tammy's counsel unquestionably focuses the majority of his argument on Tammy's minority status; however, in discussing the various issues, Tammy acknowledges the basic law on arbitration as discussed by this Court in interpreting the Federal Arbitration Act (FAA) and in applying the decisions of the United States Supreme Court. In the course of this discussion, Tammy asserts, *inter alia*, that under Mississippi law, the courts, "when determining whether a dispute is subject to arbitration . . . must first ask (1) whether the parties had a valid agreement in arbitration and (2) whether the specific dispute falls within the substantive scope of that agreement." Tammy undergirds this statement by citing our decision in *East Ford, Inc. v. Taylor*, 826 So. 2d 709, 713 (Miss. 2002). Tammy also cites *Thomson-CSF, S.A. v. American Arbitration Association*, 664 F. 3d 773, 776 (2nd Cir. 1995), which stated:

> Arbitration is contractual by nature—"a party cannot be required to submit to arbitration any

> dispute which he has not agreed so to submit." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 4 L. Ed. 2d 1409, 80 S. Ct. 1347 (1960). Thus, while there is a strong and "liberal federal policy favoring arbitration agreements," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625, 87 L. Ed. 2d 444, 105 S. Ct. 3346 (1985) (quotations omitted), such agreements must not be so broadly construed as to encompass claims and parties that were not intended by the original contract.

Id. at 776.

Captain D's likewise states, "[w]hen evaluating a motion to compel arbitration it must be shown that a valid agreement to arbitrate exists and whether the dispute in question falls within the scope of that arbitration agreement. *Fleetwood Enterprises, Inc. v. Gaskamp*, 280 F. 3d 1069, 1073 (5th Cir. 2002)."

This Court's decision in today's case follows on the heels of our recently-decided opinion in *Rogers-Dabbs Chevrolet-Hummer v. Blakeney*, 950 So. 2d 170 (Miss. 2007). In *Rogers-Dabbs*, we once again set out the well-established responsibility of the courts when confronted with arbitration issues by stating that the courts must first determine whether the parties have agreed to arbitration of the dispute and if it is determined that they have, then a determination must be made as to "whether legal constraints external to the parties' agreement foreclosed arbitration of those claims." *Id.* at 173 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985)). *See also East Ford*, 826 So. 2d at 713.

Since our decision today turns on the first prong (whether the parties agreed to arbitrate the dispute), we focus only on this prong. As we have noted on prior occasions, this first prong has two sub-factors: "(1) whether there is a valid arbitration agreement and (2) whether the parties' dispute is within the scope of the arbitration agreement." *Rogers-Dabbs*, 950 So. 2d at 173 (quoting *East Ford*, 826 So. 2d at 713)). In *Rogers-Dabbs*, the vehicle purchaser, Blakeney, executed various documents relating to the purchase, including an arbitration agreement wherein Blakeney agreed with the dealer, Rogers-Dabbs, to submit to arbitration "all claims, demands, disputes or controversies of every kind or nature between them arising from, concerning or relating to" the transaction, including negotiations, financing arrangements, extended warranties, performance of the vehicle, "or any other aspect of the vehicle and its sale, lease, or financing." *Id.* at 174. Blakeney eventually sued Rogers-Dabbs under several theories, asserting that the car dealer's employee(s) had engaged in a fraudulent scheme to use Blakeney's identity to obtain forged titles to stolen vehicles, resulting in Blakeney never receiving title to his vehicle. Rogers-Dabbs filed a motion to compel arbitration based on the arbitration clause in the consumer contract, and the trial court denied the motion to compel arbitration. On appeal, we affirmed the trial court's denial of the motion to compel arbitration. This Court found that the parties' dispute "was not within the scope of the arbitration agreement." *Id.* at 178. In reaching this conclusion, the Court stated that while the purchaser no doubt had agreed to arbitrate claims originating from (or relating to) the sale of the vehicle, "no reasonable person would agree to submit to arbitration any claims

[taking the claims as alleged to be true for the sake of argument] concerning a Hummer to which he would never receive a title; a scheme of using his name to forge vehicle titles and bills of sale to sell stolen vehicles; and the commission of civil fraud against him by misappropriating his title to the Hummer he purchased and forging his name on fake titles and bills of sale on various stolen vehicles . . ." *Id.* at 177. Although we found the existence of a valid arbitration agreement, we found, on the other hand, that the dispute between the purchaser and dealer was not within the scope of the arbitration agreement. Thus, we found that the car dealer had failed to satisfy the first prong of *East Ford*, that being whether the parties had agreed to arbitrate the dispute. *Id.* at 176, 178.

Turning to the facts of today's case, Captain D's Employment Dispute Resolution Plan stated, *inter alia*:

> [B]oth Captain D's and I agree to settle any and all previously unasserted claims, disputes, or controversies arising out of or relating to my application for employment, employment and/or cessation of employment with Captain D's, exclusively by final and binding arbitration before a neutral Arbitrator. By way of example only, such claims include claims under federal, state and local statutory or common law, such as the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, as amended, including the amendments of the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Medical Leave Act, the law of contract and law of tort.

> I understand that if I do file a lawsuit regarding a dispute arising out of or relating to my application for employment, employment, or cessations (sic) of employment, Captain D's may use this Agreement in support of its request to the court to dismiss the lawsuit and require me to use arbitration.

Just as in *Rogers-Dabbs*, there is no fervent effort to attack the validity of the arbitration agreement which Tammy signed, other than the assertion of disaffirmance. Therefore, we quickly move to the first prong's second consideration—whether the parties' dispute is within the scope of the arbitration agreement. *Rogers-Dabbs*, 950 So. 2d at 176 (citing *East Ford*, 826 at 713)). In determining the scope of the arbitration agreement, "[c]ourts often characterize arbitration language as either broad or narrow." *MS Credit Ctr., Inc. v. Horton*, 926 So. 2d 167, 175 (Miss. 2006). The United States Supreme Court has found similar language—"any controversy or claim arising out of or related to"—to constitute a broad arbitration provision. *Smith Barney, Inc. v. Henry*, 775 So. 2d 722, 726 (Miss. 2001) (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967)). "Because broad arbitration language is capable of expansive reach, courts have held that it is only necessary that the dispute "touch" matters covered by the contract to be arbitrable." *Horton*, 926 So. 2d at 176 (internal quotation marks omitted). Further, "relate" means "to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with; with "to." Black's Law Dictionary 892 (Abridged 6th ed. 1991).

The question of "scope" is narrowed to whether Tammy's rape claim arises out of or relates to "[Tammy's] application for employment, employment, and/or cessation of employment with Captain D's," so as to subject Tammy's sexual assault claim to arbitration. While recognizing the breadth of the language in the arbitration provision, we unquestionably find that a claim of sexual assault neither pertains to nor has a connection with Tammy's employment.

In sum, we find that Tammy's sexual assault claim against Captain D's and its employee is clearly not within the scope of the arbitration agreement; therefore, Captain D's "fails to satisfy the first prong of *East Ford* (whether the parties have agreed to arbitrate the dispute)." *Rogers-Dabbs*, 950 So. 2d at 178. Likewise, as we found in *Rogers-Dabbs*, our action today does not offend the Federal Arbitration Act by remanding this case for a full trial on the merits of the case. *Id.*

For the reasons stated, we find this issue to have merit, and since this issue is dispositive, we deem it unnecessary to address the other issues raised on appeal.

CONCLUSION

For the reasons stated, the Alcorn County Circuit Court's judgment compelling Tammy to arbitration and dismissing her claims is reversed, and this case is remanded to the trial court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

SMITH, C.J., WALLER, P.J., EASLEY, RANDOLPH AND LAMAR, JJ., CONCUR. DIAZ, P.J., AND GRAVES, J., CONCUR IN RESULT ONLY. DICKINSON, J., DISSENTS WITH SEPARATE WRITTEN OPINION.

DICKINSON, JUSTICE, DISSENTING:

After much discussion with my fellow justices comprising the majority concerning our respective views in this case, and after carefully reexamining my own view, I unfortunately find it impossible to withhold this dissent. This is so, even though my disagreement with the majority's conclusions is slight. The majority and I are in agreement that Tammy Smith and Captain D's entered a valid, binding arbitration agreement. There were no other issues raised by the parties and briefed to the trial court or to this Court on appeal. Thus, the majority today takes the unusual step of deciding an interlocutory appeal on an issue never raised or briefed by either party, and not discussed by the trial court. ¶22. My disagreement with the majority may be summarized as follows: The majority correctly concludes that Tammy must submit her claims to arbitration if they "arise out of or relate to her employment." However, the majority then decides (apparently as a matter of law) that Tammy's claims do not relate to her employment. It is my view that we don't know whether they do or not because the issue (which I believe to be fact-intensive) was never raised with the trial court,[6] and

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[6] Tammy raised three issues with the trial court in opposition to Captain D's motion to compel arbitration. She claimed (1) that the Mississippi Arbitration Act did not apply to minors; (2) that her grandmother, Pat Spencer, (who co-signed the

was neither raised nor briefed here.[7] Thus, I respectfully dissent from the majority's disposition of this case, and would instead remand the case for an evidentiary hearing.

Tammy, who was an employee of Captain D's, alleges that her employer was negligent in hiring, supervising, and retaining her manager, Christopher Howell, and that she was assaulted by her manager at the restaurant.

I think it important to note here that, in its zeal to separate what it calls "Tammy's rape claim" from the scope of her arbitration agreement, the majority fails to absorb the fact that Tammy filed no "rape claim" against Captain D's. Her claim against Captain D's (as the majority recognizes and states elsewhere in its opinion) is for "negligent hiring, supervision, and retention" of her manager, Howell.[8] Thus, this Court is not really being called upon today (as the majority asserts) to decide "whether Tammy's rape claim arises out of or relates to" her employment.

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arbitration agreement) did not hold the status of plaintiffs guardian; and (3) that the cost of arbitration was prohibitive.

[7] The trial judge granted Captain D's motion to compel arbitration. Tammy filed an interlocutory appeal with this Court, raising the issues of (1) whether a minor may disaffirm an arbitration agreement; (2) whether the arbitration agreement was unconscionable; and (3) whether Captain D's should be prevented from compelling arbitration after asserting the affirmative defense of "exclusive remedy" under the Workers Compensation Act. In her order, Judge Aycock stated it was "apparent Plaintiff's real contention is that Plaintiff, due to her minority status, should not be bound by the arbitration agreement."

[8] Tammy did, of course, file a "rape claim" against Howell (the perpetrator). However, neither Howell nor Tammy's rape claim against him is before us.

As stated, there is no dispute that Tammy is bound by the arbitration agreement. Therefore, she must submit her claims against Captain D's to arbitration if they "arise out of or relate to" her employment. In her efforts before the trial court (and before this Court) to avoid arbitration, Tammy argued only that she was not bound by the agreement. She neither stated nor implied that she should not be required to arbitrate because her claims did not relate to her employment.[9]

Footnote 1, supra, specifically lists Tammy's three arguments, none of which even hint that Tammy takes the position that her claims do not relate to her employment. The majority, realizing that the issue has not been raised, skillfully and smoothly claims to "restate the critical issue for clarity in discussion." I'm not sure I know what this means, but I am sure that it would be inaccurate to conclude that the majority's deciding issue somehow flowed from the issue raised before this Court.

Not only was the issue never raised nor briefed by any of the parties, but it seems to me its resolution requires an examination of the facts—an examination never conducted by the trial court or the majority. The trial court never examined the facts because the trial court was presented with no facts on the issue to examine. This Court, of course, never examined the facts because we were placed by the

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[9] It could be argued that Tammy's claims against Captain D's so clearly relate to her employment that Tammy's counsel didn't even bother raising the issue with the trial court or here. One would think if Tammy's counsel concluded the argument had any merit whatsoever, it would have at least been raised and argued.

parties in the same position as the trial court, that is, we were given no facts to examine.

All we are told about Tammy's claim is that she alleges in her complaint "Mil or about February 18, 2004, at approximately 10:00 a.m., at the Captain D's restaurant . . . Howell, while in the scope and scope of his employment injured the plaintiff, Smith, by willfully and intentionally assaulting and raping her on the restaurant premises in the women's restroom." Tammy's complaint further alleges that Captain D's should be held responsible for damages because it negligently hired Howell as a supervisor and failed to properly monitor and supervise him. More significantly, Tammy claims that "Captain D's had a duty to supervise employee, Howell, when he dealt with the public and with fellow employees."

In my view, there are many unaddressed factual questions which bear on the issue of whether Tammy's claims against Captain D's of negligent hiring, retention, and supervision of Howell relate to her employment. For instance, we do not know (1) whether the restaurant was open for business, or was closed with the doors locked, with only employees (perhaps only Tammy) locked inside with the manager; (2) whether Tammy was working at the time, and thus was required (as an employee) to be on the premises and under Howell's supervision and control; (3) whether Howell, in his capacity as manager, ordered Tammy to go to the restroom for some pretextual reason, such as to take toilet paper or paper towels; (4) whether customers or other employees were present in the restaurant or in the rest room at the time of the incident; or (5) whether Tammy failed to stop the assault out of fear of losing her job.

It seems to me important for the trial court to address these and many other factual questions. For instance (and only by way of hypothetical example), suppose the facts revealed that:

> Tammy reported for work at 9:30 on the day in question, and that the restaurant was not open to the public. No employees other than Tammy and Howell were present. While Tammy was preparing to open the restaurant, Howell (as Tammy's manager) ordered her to fill the paper towel dispenser in the Ladies' restroom. Tammy complied with her manager's order and went into the restroom, and the manager then followed her in and began to assault her. When Tammy attempted to resist, Howell, threatened to fire her if she resisted further, or if she reported the incident. And even though Captain D's was aware that Howell had done the same thing at other restaurants in the past, it hired him anyway.

I wish to emphasize that *we have no reason to believe that any of these things happened*, but neither do we have any reason to know that they didn't. We just don't know, and neither did the trial judge. Under the above hypothetical facts, it could hardly be argued with credibility that Tammy's claim is not "related to" her employment since it was because of her employment that she was present in the store with the doors locked, and was subject to the manager's orders and threats.

On the other hand, it could be that Tammy was not working, but just stopped by to get something to eat and Howell, seeing her go into the restroom, followed her in and assaulted her. Again, this is a hypothetical, and we have no reason to believe that the

assault alleged by Tammy happened this way. But if it did, it would be difficult to argue that the assault was related to Tammy's employment.

I firmly believe this matter should be remanded to the trial court for an evidentiary hearing and a determination of whether Tammy's claims against Captain D's relate to her employment. If the trial court, after reviewing the evidence submitted by the parties, concludes that they do, this case should be settled in arbitration. If it does not, then the matter should proceed to trial in the circuit court.

Because the majority decides this appeal on an issue never raised; ignores the need for a factual determination; and simply decides as a matter of law that Tammy's claims do not relate to her employment, I respectfully dissent.

APPENDIX B

IN THE CIRCUIT COURT OF ALCORN COUNTY, MISSISSIPPI

CIVIL ACTION NO. CV04-281(A)A

TAMMY SMITH BY AND THROUGH HER FATHER & NEXT FRIEND, ALVIN CHRISTOPHER SMITH,
Plaintiff

versus

CAPTAIN D'S, LLC AND CHRISTOPHER LEE HOWELL.
Defendants

OPINION

THIS CAUSE having come before the Court on the motion of Captain D's, LLC, to dismiss the Plaintiff's Complaint against Captain D's, LLC, and to compel arbitration. The Court having considered said motion; having heard arguments of counsel; and being otherwise fully advised in the premises, finds that the motion is well-taken and that it should be GRANTED.

THE FACTS

The facts of this case are essentially not in dispute. The Plaintiff Tammy Smith was seventeen years old when she moved in with her grandparents in July 2003. She was living with her grandparents in February 2004 when she sought employment with Captain D's restaurant in Corinth, Alcorn County, Mississippi. She completed an employment application and executed an "Employee Dispute Resolution Plan" which contained a binding arbitration clause. Plaintiff's grandmother, Mrs. Spencer, also signed

the document. There was little, if any, discussion regarding the Employee Dispute Resolution Plan at the time of the execution. On February 18, 2004, Plaintiff was raped by the store manager at the restaurant location.

Plaintiffs counsel initially contended Tammy Smith did not execute the agreement, that Plaintiff's grandmother did not hold the status of Plaintiff's guardian and raised objections to the cost of arbitration. However, after considerable argument, oral and by brief, it is apparent Plaintiff's real contention is that Plaintiff, due to her minority status, should not be bound by the arbitration agreement.

THE LAW

Congress has declared a national policy in favor of arbitration. *Phearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987); *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983); *Dean Whitter Rentals. Inc. v. Bryd*, 470 U.S. 213 (1985). Likewise, our Mississippi Supreme Court has adopted many cases favoring arbitration. "The case law in Mississippi regarding arbitration and the Federal Arbitration Act are consistent with one another." *Smith Barney. Inc. v. Henry*, 775 So. 2d 722 (Miss. 2001); *also see Hutto v. Jordan*, 204 Miss. 30, 36 So. 2d 809, 812 (Miss. 1948). The Federal Arbitration Act does not exclude minors from its application. Federal substantive law of arbitrability must be applied in state court proceedings involving the Federal Arbitration Act. *See Southland Corporation v. Keatings*, 465 U.S. 116 (1984), 104 S.Ct. 852, 861, 79 L. Ed. 2d, 1, 15, fn.10; *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614 (1985), 627 105 S. Ct 3346, 3354, 87 L. Ed, 2d 444, 455-456.

The Plaintiff contends Mississippi law specifically prohibits a minor from submitting to arbitration. The Defendant argues that the Federal Arbitration Act controls and a minor in Mississippi should not be allowed to disaffirm an arbitration clause by asserting infancy. Counsel for both parties advised the Court no Mississippi cases have been decided on whether minors can disaffirm an arbitration clause based on the "infancy doctrine". Clearly, it is well settled in Mississippi that contracts with infants impose no liability on them which is not voidable at their election. *Lott Mellott v. Love*, 119 so. 2d 913 (Miss. 1929); *Ferguson v. Bobo*, 54 Miss. 121 (Miss. 1876); *Bell v. Smith*, 124 So. 331 (Miss. 1929); *Star Chevrolet Co. v. Green by Green*, 473 So. 2d 157 (Miss. 1985).

While Mississippi has not decided the legal issue of whether a plaintiff's status as a minor is a sufficient challenge to arbitration, other state courts have determined minors cannot disaffirm an arbitration clause. *Sheller v. Franks Nursery and Crafts, Inc.*, 957 Fed. Supp. 150 (N. D. Ill. 1997). The Illinois infancy law is akin to Mississippi's infancy law and states, "The general rule applicable to all contracts, other than for necessaries, is that the contract of a minor is voidable and may be repudiated by the minor during minority or within a reasonable time upon achieving majority absent a ratification." *Sheller* at 153. The Illinois Court reasoned that "the privilege of minority . . . . is to be used as a shield and not as a sword." That is, "after disaffirmance, the infant is not entitled to be put in a position superior to such a one as he would have occupied if he had never entered into the voidable agreement." The minor "is not entitled to retain an advantage from a transaction which he repudiates." *Id.* A Pennsylvania Court in

Doyle v. Giuliucci, reasoned a minor is a beneficiary of such an agreement because it enables the minor to obtain employment which would be unavailable unless the minor agreed to resolve differences through an arbitration agreement. *Doyle v. Giuliucci*, 401 P.2d 1 (1965). Indeed, our Mississippi Courts have aligned itself with a similar limited application of the infancy law doctrine. *See Star Chevrolet Co. v. Green*, 473 So. 2d 157 (Miss. 1985). (Holding, minor may not use infancy, which is a shield for protection, as a sword for attack; such conduct by a minor amounts to fraud); *Also see Evans v. Morgan*, 12 So. 270 (Miss. 1891).

Plaintiff further claims the arbitration clause is unenforceable because it is procedurally and substantively unconscionable. Arbitration agreements are not per se inherently unconscionable. *East Ford Inc. v. Taylor*, 826 So. 2d 709, 714 (Miss, 2002). Procedural unconscionability may be proved by showing "a lack of knowledge, lack of voluntariness, inconspicuous print, the use of complex legalistic language, disparity in sophistication or bargaining power of the parties and/or a lack of opportunity to study the contract and inquire about the contract terms." *Id.* at 714. The Plaintiff is charged with reading the contract. *Washington Mut. Finance Group, LLC v. Bailey*, 364 F.3d 260, 265 (5th Cir. 2004). In Mississippi, a person is charged with knowing the contents of any document that he executes. *J.R. Watkins Co. v. Runnels*, 252 Miss. 87, 96, 172 So. 2d 567, 571 (Miss. 1965). "A person cannot avoid a written contract which he has entered into on the ground that he did not read it or have it read to him." *Id.* In the subject case, the minor, accompanied by her grandmother, are presented the contract which contains the arbitration clause. The Employee Dispute Resolution Plan

consists of one page (6 paragraphs). In plain language and conspicuous print it explains that if there is a dispute involving employment, Captain D's can use the agreement to ask a court to dismiss a lawsuit and require plaintiff to use arbitration. Mrs. Spencer's presence and signature would indicate her guardian status as well as her voluntary, but necessary, consent. Plaintiff testified that she loves to read and makes good grades. If she had read the agreement and did not understand the agreement she was obligated to ask questions before signing. She testified she asked no questions. It is disingenuous to claim that the document was complex if she made no attempt to read the agreement. Substantive unconscionability is shown by oppressive terms of the agreement. *Rusell v. Performance Toyota, Inc.*, 826 So. 2d 719 (Miss. 2002); *East Ford*, at 714. The facts in this case do not rise to one of substantive unconscionability.

The Mississippi Supreme Court has recently compelled arbitration when the defenses of unconscionability, contracts of adhesion, and lack of meaningful choice were raised. *See Northwest Financial Mississippi, Inc. v. McDonald*, 2005 WL 67487, pages 11-23 (Miss.2005).

> Borrowers' arbitration agreements with lenders were not shown to be procedurally and substantively unconscionable, despite claims that they were adhesion contracts and the borrowers lacked a meaningful choice; each borrower signed a single-page arbitration agreement written in plain language, the borrowers did not claim that they were unable to read or that they asked anyone to explain arbitration, they simply stated that no one informed them that they were sign-

ing an arbitration agreement or told them what an arbitration was, any reasonable person would know that the right to a jury trial was waived, and the borrowers submitted no evidence that they could not get a competitive loan from another company or that could not do without the loan.

In enacting § 2 of the Arbitration Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration. *IP Timberlands Operating Co., Ltd. v. Denmiss Corp.*, 726 So. 2d 96 (Miss. 1998), quoting *Southland Corp. v. Keating*, 465 U.S. 1 (1984)

CONCLUSION

Notwithstanding the well settled Mississippi Law of the doctrine of infancy and our state's adherence to the protection of minors, this Court is of the opinion that minors who execute arbitration clauses should not be able to disaffirm those agreements. Practically speaking, thousands of our Mississippi youth are employed by nationally known publically traded and private employers, many of which utilize arbitration agreements. The minors receive a benefit, i.e. employment and compensation, that they should not later be allowed to disavow. Opportunities exist for employment that do not require the execution of an arbitration agreement. In light of our proclaimed federal and state courts' preference for arbitration, Tammy Smith should not be allowed to disaffirm the arbitration clause that she voluntarily signed and for which she received full benefits even though she did not read the agreement nor ask any questions regarding it meaning. Arbitration does not preclude

recovery for the Plaintiff, rather, merely selects her forum.

IT IS, THEREFORE, ORDERED AND ADJUDGED that all claims made by the Plaintiff in her Complaint against Captain D's, LLC, shall be submitted to binding arbitration in accordance with the terms of the arbitration agreement entered into by the Plaintiff with Captain D's, LLC, and that the Alcorn County Circuit Court action shall be dismissed accordingly as to Captain D's, LLC. The claims by the Plaintiff against separate Defendant, Christopher Lee Howell, for independent liability on his part, if any, are not subject to this order.

ORDERED AND ADJUDGED, THIS, the 13th day of December, 2005.

/s/ Sharion Aycock
SHARION AYCOCK
Circuit Court Judge

APPENDIX C

SUPREME COURT OF MISSISSIPPI
Court of Appeals of the State of Mississippi
Office of the Clerk

Betty W. Sephton
Post Office Box 249
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39205-0249
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September 13, 2007

This is to advise you that the Mississippi Supreme Court rendered the following decision on the 13th day of September, 2007.

Supreme Court Case # 2006-CA-00024-SCT
Trial Court Case # CVO4-281AA

Tammy Smith by and through Her Father & Next Friend, Alvin Christopher Smith v. Captain D's, LLC

Motion for rehearing filed by appellee is denied. Dickinson, J., would grant.

* NOTICE TO
CHANCERY/CIRCUIT/COUNTY COURT CLERKS *

If an original of any exhibit other than photos was sent to the Supreme Court Clerk and should now be returned to you, please advise this office in writing immediately.

[Received SEP 17, 2007]

APPENDIX D

CONSTITUTION OF THE UNITED STATES

Article VI.
Debts Validated—Supreme Law of Land—
Oath of Office

Clause 2. Supreme Law of Land

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Current through P.L. 110-131 approved 11-30-07

APPENDIX E

AMENDMENT XIV.—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; not shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX F

UNITED STATES CODE

Title 9.—Arbitration
Chapter 1.—General Provisions

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

CREDIT(S)

(July 30, 1947, c. 392, 61 Stat. 670.)

Current through P.L. 110-131 approved 11-30-07

APPENDIX G

CAPTAIN D'S EMPLOYMENT DISPUTE RESOLUTION PLAN

I recognize that differences possibly may arise between Captain D's, LLC and me during my application or employment with Captain D's. I recognize that it is in the interest of both Captain D's and me that disputes be resolved in a manner that is fair, private, expeditious, economical, final and less burdensome or adversarial than court litigation. Captain D's has an effective Internal Complaint Procedure, and I will try to take advantage of it where feasible. I understand, however, that not all issues can be resolved using the Internal Complaint Procedure.

Except as set forth below, both Captain D's and I agree to settle any and all previously unasserted claims, disputes, or controversies arising out of or relating to my application for employment, employment and/or cessation of employment with Captain D's, exclusively by final and binding arbitration before a neutral Arbitrator. By way of example only, such claims include claims under federal, state and local statutory or common law, such as the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, as amended, including the amendments of the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Medical Leave Act, the law of contract and law of tort.

I understand that if I do file a lawsuit regarding a dispute arising out of or relating to my application for employment, employment, or cessations of employment, Captain D's may use this Agreement in support of its request to the court to dismiss the lawsuit and require me to use arbitration.

I understand that I still may exercise my rights under the National Labor Relations Act and file charges with the National Labor Relations Board. I further understand that I still may file administrative charges with the Equal Employment Opportunity Commission or similar federal, state or local agency, but that upon receipt of a right-to-sue letter or similar administrative determination, I shall arbitrate any claim that I may have against Captain D's.

I understand that I must file a claim under the Captain D's Employment Dispute Resolution Plan within the federal or state statute of limitations period most applicable to your claim. I further agree that if I commence an arbitration, it will be conducted in accordance with the "Captain D's Employment Dispute Resolution Plan."

I understand that neither this Agreement nor the Dispute Resolution Rules and Procedures form a contract of employment between Captain D's and me. I further understand that my signature to this Agreement in no way guarantees that Captain D's will offer me employment. If Captain D's does offer me employment and I become employed at Captain D's, this Agreement in no way alters the "at-will" status of my employment. I understand that my employment, compensation and terms and conditions of my employment can be altered or terminated, with or without cause, and with or without notice, at any time, at the option of either Captain D's or myself. I understand that no General Manager, other store manager, or representative of Captain D's, other than an Officer of Captain D's at the level of Vice-President or above, has any authority to enter into any agreement for employment for any specific duration, to make any agreement contrary to the foramina

or to after the Captain D's Employment Dispute Resolution Plan.

Social Security No.: 428-59-5975
Applicant/Employee Signature: /s/ Tammy Smith
Month: Feb Day: 3 Year: 2004
Name (Printed): Tammy Smith

In addition to the Applicant/Employee. If Applicant/Employee is under 18 years of age,a Parent or Guardian must sign below.

Parent or Guardian Signature: /s/ Pat Spencer
Month: Feb Day: 3 Year: 2004
Name (Printed): Pat Spencer

APPENDIX H

IN THE SUPREME COURT OF THE
STATE OF MISSISSIPPI

[Filed JUL 6 2007]

Case No. 2006-CA-00024-SCT

TAMMY SMITH BY AND THROUGH HER FATHER &
NEXT FRIEND, ALVIN CHRISTOPHER SMITH
Plaintiff/Appellant

vs.

CAPTAIN D'S, LLC AND CHRISTOPHER LEE HOWELL
Defendant/Appellee

On Appeal from the Circuit Court of
Alcorn County, Mississippi; Cause No. CV04-281AA

MOTION OF APPELLEE CAPTAIN D'S, LLC
FOR REHEARING

Bradley F. Hathaway
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MOTION FOR REHEARING

NOW COMES Captain D's, LLC (hereinafter "Captain D's"), Appellee herein, by counsel, and, due to specific errors of law and/or fact which this Court either overlooked or misapprehended in its original opinion, moves for rehearing.

I. Relevant Background

This appeal was taken by Tammy Smith (hereinafter "Smith") from a ruling by the Circuit Court of Alcorn County, Mississippi, dismissing Smith's circuit court suit and compelling her to submit claims she filed against her employer, Captain D's, to arbitration consistent with an arbitration agreement Smith entered into in connection with her employment with Captain D's. On appeal, Smith asserted three distinct defenses to arbitration:

1. First, Smith asserted she could disavow the arbitration agreement based on her status as a minor;
2. Secondly, she argued the arbitration agreement was unconscionable; and
3. Thirdly, she contended that arbitration had been waived by Captain D's assertion of an alternative defense.

See Smith's "Statement of the Issues" at p. 1 of Brief of Appellant.

On June 14, 2007, this Court reversed the decision of the trial court, reinstated Smith's circuit court suit, and remanded the case on the merits. Though finding that Smith and Captain D's struck a valid, binding agreement to arbitrate, the majority of the Court concluded that Smith's claims against Captain D's were not within the scope of the arbitration agreement,

finding they did not "arise out of her employment." Justice Dickinson dissented from the majority with a separately written opinion in which he aligned himself with the majority in finding that a valid, binding agreement existed but refused to evaluate the scope of the arbitration agreement because 1) the defense had never been raised or briefed at the trial court or on appeal; and 2) the defense wholly depended on facts not before the Court.

Captain D's respectfully urges the Court to reconsider its ruling, which constitutes a significant departure from settled law and, if allowed to stand, would significantly change the law regarding appellate issues in general and arbitration issues specifically. The particular errors in the Court's ruling are as follows:

1. The ruling disregards or ignores the procedural bar to issues not raised by an appellant before the trial court, departing from *stare decisis*;

2. Closely related to #1, the Court either overlooked or misapprehended Smith's admission that her dispute fell within the scope of the arbitration agreement.

3. The ruling eliminated or unreasonably relaxed the burden of proof of the party contesting arbitration in violation of the Federal Arbitration Act ("FAA"); and

4. The Court misapprehended the true nature of Smith's claims against Captain D's because of facts not before the Court.

For these reasons, as demonstrated below, Captain D's submits that the original opinion of the Court

should be withdrawn and replaced by an opinion affirming the holding of the trial court.

II. The Court Ignored the Procedural Bar and Either Overlooked or Misapprehended Smith's Assertion to the Trial Court That Her Dispute Arose Out Of Or In Course Of Her Employment With Captain D's

Stare decisis et non quieta movere: security and certainty require that accepted legal principle not be unsettled.

The decision by this Court is a dramatically consequential one, considering that an otherwise pedestrian arbitration case has singularly uprooted the legion of cases holding that appellants will not be heard to assert a claim—or raise a defense—or seek resolution of an issue—which was not raised at the trial court. Making this ruling all the more unique is that a defense to arbitration was raised and tried sua sponte by the Court without being raised at any time by the party who had the burden of raising the defense and proving entitlement to it.

More specifically, the Court took Smith's three defenses to arbitration and, it is respectfully submitted, improperly recast them as a challenge to the scope of the arbitration agreement. It is worth noting at this point two basic facts: 1) Smith never challenged the scope of the arbitration agreement; and 2) Smith took the position at the trial court level that her claims against Captain D's were within the scope of the arbitration agreement.

The parties and the Court were blessed in this case with an ample record. Captain D's originally responded to Smith's lawsuit by moving to dismiss it and to compel the claims to arbitration. (C.P. 17).

Smith filed her initial objections to arbitration, resisting it on the grounds: 1) that she did not execute the agreement; 2) that she was not bound by the agreement; and 3) that the costs of arbitration were objectionable. Smith later clarified that she was not denying that she actually executed the arbitration agreement but rather disputed she was bound by it due to her status as a minor. (C.P. 63). Smith then moved to compel discovery to develop her objections, and the trial court granted Smith's request for discovery on her two narrow objections: 1) her entry into the arbitration agreement as a minor; and 2) the costs associated with the arbitration agreement. (C.P. 117). Smith's "waiver" defense did not appear until her appeal. Discovery ensued and supplemental briefs were submitted by both parties to supply the trial court with the benefit of the arbitration-related discovery. (C.P. 123 and 305).

In her supplemental brief to the trial court, Smith unequivocally proclaimed:

> *But for the intentional tort exclusion, this case would fall under the Workers' Compensation Act.*

(C.P. 305 at p. 7; Appendix 1) (emphasis added). Needless to say, for a claim to "fall under the Workers' Compensation Act" it must "arise out of and in the course of employment." Miss. Code. Ann. § 71-3-7. Much more, then, than simply not contesting that her claims fell outside the scope of the arbitration agreement, Smith actually asserted to the trial court that her claims "arose out or' her employment—a position totally consistent with not challenging the scope of the agreement. As the subject arbitration agreement unambiguously covered all "claims, disputes, or controversies *arising out of or relating to [Smith's] employment . . . with Captain's D's*," (R.E. 1)

there was never a case or controversy concerning the scope of the agreement.

That notwithstanding, the Court found, without the benefit of any facts, that Smith's "sexual assault claim *against Captain D's and its employee* is clearly not within the scope of the arbitration agreement." ¶ 17 (emphasis added).1 This holding demonstrated an unprecedented expansion of appellate review. No other pronouncement of law has been indoctrinated into the law more than the rule that an issue not raised before the lower court and only raised for the first time on appeal is deemed waived and procedurally barred. *Cooper v. Lawson*, 264 So.2d 890, 890 (Miss. 1972); *Harbin v. Chase Manhattan Bank*, 871 So. 2d 764, ¶ 6 (Miss. App. 2004).

In *Waters v. Gnemi*, 907 So. 2d 307 (Miss. 2005), this Court wrote:

> We have been consistent in holding that we need not consider matters raised for the first time on appeal, which practice would have the practical effect of depriving the trial court of the opportunity to first rule on the issue, so that we can then review such trial court ruling under the appropriate standard of review. If we were to adopt such a practice of considering for the first time on appeal matters not raised before the trial court, such practice would have the chilling effect of depriving the trial court of the opportunity to

---

[1] This statement reflects a critical misapprehension of the claims against Captain D's. Smith states no "sexual assault claim" against Captain D's, only against its employee, Christopher Howell, who did not assert a right to arbitration. Smith's claims against Captain D's are "negligent hiring, supervision and retention."

> first rule on the issue, which would then deprive this Court of the opportunity to perform our mandated appellate review by utilizing the appropriate standard for review of the trial court's ruling.

Waters, 907 So. 2d at ¶39.

In *Leverett v. State*, 197 So. 2d 889 (Miss. 1967), it was said:

> The Supreme Court is a court of appeals, it has no original jurisdiction; it can only try questions that have been tried and passed upon by the court from which the appeal is taken. Whatever remedy appellant has is in the trial court, not in this court. This court can only pass on the question after the trial court has done so.

Leverett, 197 So. 2d at 890 (quoting *Collins v. State*, 159 So. 865 (1935)).

That *de novo* review is applied to grants or denials of arbitration does not limit that principle. In *Gulf Ins. Co. v. Neel-Schaffer*, an arbitration-related case in which the Court also exercised *de novo* review, Justice Carlson, writing for the majority, addressed a party's opposition to arbitration on grounds raised for the first time on appeal by firmly stating:

> Finally, Neel-Schaffer makes several arguments based upon principles of equity, estoppel and unconscionability. These are procedurally barred and without merit. *As to substantive unconscionability, this issue is procedurally barred based on the fact that it is raised for the first time during this appeal.*

Gulf Ins. Co. v. Neel-Schaffer, 904 So. 2d 1036, ¶32 (Miss. 2004) (emphasis added).

In *Speedee Cash of Mississippi, Inc. v. Williams*, this Court, reviewing a trial court's denial of arbitration under the de novo standard, devoted a special section of the opinion to the matter of preserving defenses to arbitration, writing:

> In the appellee's brief presented to the Court, Williams makes a claim of unconscionability, and Speedee Cash responds to this claim in its appellant's reply brief. *However, there is absolutely nothing in the record to show that this claim was raised before the circuit court. The only claims in Williams' complaint are those of wrongful repossession, conversion, etc. Unconscionability is not mentioned.* While there is a notice of hearing on Speedee Cash's motion to compel arbitration, there is no transcript of a hearing. While Speedee Cash filed a memorandum in support of its motion to compel, Williams never filed a response. Finally, the circuit court's order denying Speedee Cash's motion to compel arbitration is a summary order and offers absolutely no rationale for the circuit court's decision. *Therefore, we must treat the issue of unconscionability as one never presented to the circuit court and apply the procedural bar. See, e.g., Brewer v. State*, 819 So.2d 1169, 1175 (Miss.2002).
>
> *Because Williams raised no issues and offered no evidence to the circuit court as to why the arbitration agreement should not be enforced, we reverse the circuit court's denial of Speedee Cash's motion to compel arbitration.*

Speedee Cash of Mississippi, Inc. v. Williams, 915 So. 2d 1061, ¶ 6 and ¶ 7 (Miss. 2005) (emphasis added).

In the instant case, there was a departure from this settled law, eschewing the procedural bar altogether. The Court, instead, likened the instant case to the recently-decided opinion in *Rogers-Dabbs Chevrolet-Hummer v. Blakeney*, 950 So. 2d 170 (Miss. 2007) and, following a lengthy discussion of *Rogers-Dabbs*, arrived at the conclusion that Smith's claims were similarly not contemplated by the arbitration agreement. Absent from this discussion was a pivotal distinction between *Rogers-Dabbs* and this case. In *Rogers-Dabbs*, Justice Carlson listed at the outset of the Court's opinion the precise defenses asserted by Blakeney, the party resisting arbitration before the circuit court, as follows:

> *On the other hand, Blakeney asserts . . . that he did not agree to have claims involving identity theft and forgery resolved by arbitration inasmuch as such claims were not contemplated by the arbitration agreement*; that the FAA prerequisites are not satisfied; and that the arbitration agreement at issue is procedurally unconscionable.

¶6 (emphasis added).

The significant peril presented by the Court's decision to future litigants confronted with arbitration issues is that it requires parties who are seeking to preserve a trial court's grant of arbitration to anticipate (and thus brief) defenses not raised by the party resisting it. Smith did not challenge the scope of the arbitration agreement and Captain D's naturally did not devote briefing to the issue, yet the Court's analysis turned on the scope of the agreement. If the Court's decision is mandated, it stands to reason that it will unsettle and retool the landscape of arbitration law. Consider that there are two prongs to determin-

ing whether a dispute is subject to arbitration: 1) did the parties have a valid agreement to arbitrate; and 2) does the controversy fall within the substantive scope of the agreement. If, now, a party resisting arbitration does not contest the first prong (and perhaps, even confesses the first prong is met) but only challenges the second prong, must the party seeking to uphold arbitration regardlessly strive to disprove the validity of any defenses to the first prong where none has been raised? Respectfully, time-honored precedent does not support that.

What, too, is to made of the fact that "arbitration is contractual by nature." *See United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 4 L. Ed. 2d 1409, 80 S. Ct. 1347 (1960). If a party, such as Smith, does not contend her dispute is one which she did not agree to arbitrate, is it not a substitution of judgment and violation of the freedom to contract to make a contrary decision for her? The only reasonable conclusion that can be drawn from the fact that Smith's very capable attorneys did not make such a claim is because it was so clear to them that Smith did contract to arbitrate claims of the nature at issue. The undersigned was unable to find another decision by this Court where, when faced with such mutual assent, the Court altered the agreement of the parties.

The integrity and stability of our judicial system and even our broader society relies on settled principles of law—which have been hewed and formed and fashioned over time and then withstood the crucible of consistent application —remaining settled. *Stare decisis* has always been the preferred course of action for this Court. "Our application of *stare decisis* is necessary, *inter alia*, so that trial courts can make

correct decisions and lawyers can properly advise their clients." *United Services Auto. Ass'n v. Stewart*, 919 So.2d 24, ¶21 (Miss. 2005).

By invoking for Smith a defense to arbitration which was not raised or briefed (and which would constitute an about-face by Smith from her position at the trial court), Captain D's respectfully submits that the Court erred and, upon reconsideration of the matter, the trial court's grant of arbitration should be affirmed.

III. The Court's Decision Unreasonably Relaxed If Not Eliminated Altogether Smith's Burden of Proof

By holding as a matter of law that Smith's claims were not contemplated by the scope of the subject arbitration agreement, the Court rendered an opinion in conflict with established arbitration law and relaxed, if not eliminated, Smith's burden of proof.

The Court has consistently aligned itself with federal precedent in declaring that it "will respect the right of an individual or entity to agree in advance of a dispute to arbitration or other alternative dispute resolution." *MS Credit Center, Inc. v. Horton*, 926 So.2d 167, ¶20 (Miss. 2006) (citing *Russell v. Performance Toyota, Inc.*, 826 So. 2d 719, 722 (Miss. 2002). "Indeed, it is not a matter of discretion since [the Court's] duty requires [it] to follow the law." *Id.* Consistent with this policy, doubts concerning 1) the scope of arbitration agreements and 2) asserted defenses are resolved in favor of arbitration. *Id.* A fortiori, it is an imperative that a party resisting arbitration on the ground that the subject claims are not arbitrable bears the burden of proving it. *Id.*

In *Norwest Financial Mississippi, Inc. v. McDonald*, 905 So.2d 1187 (Miss. 2005), this Court acknowledged where the burden of proof squarely lies:

> Additionally, the lenders do not have the burden to prove lack of unconscionability, as argued in the Parkerson concurring opinion. *The party resisting arbitration must shoulder the burden of proving a defense to arbitration.*

McDonald, 905 So.2d at 1193 (emphasis added); *see also Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 81, 121 S. Ct. 513, 517 (2000) (highest court holding that party seeking to invalidate an arbitration agreement bears the burden of proving that the claims are unsuitable for arbitration, pointing out that *"[t]he Court need not discuss how detailed such a showing would have to be, for in this case, there was no timely showing at all on the point."* (emphasis added)).

Perhaps one of this Court's strongest statements regarding the burden of proof which must be demonstrated by a party resisting arbitration on the grounds that claims are not arbitrable is found in *IP Timberlands Operating Co., Ltd. v. Denmiss Corp.*, 726 So.2d 96, ¶46 (Miss. 1998):

> Doubts as to the availability of arbitration must be resolved in favor of arbitration. Unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue, then a stay pending arbitration should be granted.

See also Terminix Intern., Inc. v. Rice, 904 So.2d 1051 (Miss. 2004), Russell, 826 So.2d at 722.

Here, Smith made no showing whatsoever regarding the scope of the arbitration agreement. At the

risk of repetition, the very nature of Smith's claims against Captain D's depend on them "arising out of her employment" with Captain D's; hence, her admission that "[b]ut for the intentional tort exclusion, this case would fall under the Workers' Compensation Act." As in *Norwest Financial Mississippi, Inc.*, Captain D's did not have the burden to prove Smith's claims were contemplated by the arbitration agreement, Smith had the burden to prove *they were not*—and she did not.

Even so, the subject arbitration agreement stipulated that "claims, disputes, or controversies arising out of or relating to [Smith's] . . . employment . . . with Captain's D's" would be arbitrated. Arbitration language which includes claims "related to" is characterized as broad language. "Because broad arbitration language is capable of expansive reach, courts have held that *'it is only necessary that the dispute "touch" matters covered by (the contract] to be arbitrable:"* *Horton*, 926 So. 2d at ¶25 (emphasis added) (quoting *Penzoil Exploration & Prod. Co. v. Ramco Energy, Ltd.*, 139 F.3d 1061, 1068 (5th Cir. 1998) (citing *Mississippi Fleet Card, LLC v. Bilstat, Inc.*, 175 F. Supp. 2d 894, 899 (S.D. Miss. 2001); *First Family Fin. Serv., Inc. v. Fairley*, 173 F. Supp. 2d 565, 570 (S.D. Miss. 2001); *Blount v. Nat'l Lending Corp.*, 108 F. Supp. 2d 66, 669 (S.D. Miss. 200); *Pridgen v. Green Tree Fin. Servicing Corp.*, 88 F. Supp. 2d 655, 657 (S.D. Miss. 2000).

As there is complete unanimity amongst the Court that Smith was bound by the arbitration agreement, her claims against Captain D's are arbitrable if they merely "touch" matters related to or arising out of her employment. Smith, though bearing the full weight of the burden of proof, did not suggest, imply, hint or

allude that her claims did not touch on matters related to or arising out of her employment. The Court's opinion, as it stands, relieved her of that legal imperative and created an issue where one did not exist.

Most surely, the Court did not intend to create a black-letter rule of law that "negligent hiring, supervision, and retention" claims against an employer are never arbitrable under an agreement which covers controversies "arising out of" or "related to" the subject employment. Since, however, those are the claims stated against Captain D's, without any further showing by Smith, is that not the precedential implication of the ruling? This is in conflict with the state of arbitration law across the country, even considering cases involving intentional acts such as sexual assault and the like. *See, e.g., Douglass v. Pflueger Hawaii, Inc.*, 135 P.3d 129, 139 (acknowledging parties did not dispute whether plaintiff's complaint fell within arbitration agreement, though suit included claims for "hostile, intimidating and/or offensive work environment," "unsafe working environment," "sexual assault and sexual discrimination," "negligent training of the supervisor," and "negligent supervision); *Kaddouri v. Merrill Lynch*, 2005 WL 283582, *6 (N.D. Tex. 2005) (compelling arbitration of claims by plaintiff against her employer for negligent retention, negligent training and negligent supervision of another employee accused of abusive conduct); *Ryan's Family Steak Houses, Inc. v. Regelin*, 735 So. 2d 454, 457 (Ala. 1999) (plaintiff compelled to arbitrate claims where seeking money damages against her employer for invasion of privacy, the tort of outrage, assault and battery, and negligent training and supervision, with all the claims stemming from sexually inappropriate conduct occurring in the work-

place); *Dantz v. American Apple Group, LLC*, 123 Fed. Appx. 702, 710 (6th Cir. 2005) (upholding arbitrability of claims by plaintiff against employer based on theories of unjust enrichment, sexual harassment, negligent retention, retaliation, promissory estoppel, breach of contract and spoliation of evidence); *Butcher v. Bally Total Fitness Corp.*, 2003 WL 1785027, *1 (Ohio App. April 3, 2003) (employee who brought action against her former employer for sexual harassment, sexual discrimination, hostile work environment, and negligent retention in the workplace required to submit claims to arbitration); *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698, 701 (11th Cir. 1992) (employee who brought suit against employer alleging sexual harassment and seeking redress under state law theories of battery, intentional infliction of emotional distress, and negligent retention required to submit claims to arbitration).

The case of *Hill v. JJB Hilliard, W.L. Lyons, Inc.*, 945 S.W.2d 948 (Ky. App. 1996), stands out as a particularly well-reasoned approach to analyzing a strikingly similar fact pattern in the context of whether claims of this nature are arbitrable. There, Jane Hill ("Hill") was employed by Hilliard Lyons as a stockbroker, and, as a condition of her employment, Hill was required to enter into an arbitration agreement which provided that she agreed to submit to arbitration any dispute, claim, or controversy between Hilliard Lyons and herself "arising out of her employment." *Id.* at 949.

After going to work for Hilliard Lyons, Hill alleged she was raped by her supervisor, W. William Brab ("Brab"), while they were attending a convention in New York. *Id.* at 950. She further alleged that Brab threatened her that, if she told anyone of the inci-

dent, she would lose her job. Id. Subsequently, Hill filed a state court action against Hilliard Lyons, Brab, and certain officers and directors of Hilliard Lyons, claiming assault and battery, false imprisonment, intentional infliction of emotional distress, along with sexual harassment, retaliation, and violation of equal pay laws. *Id.* All defendants collectively moved to dismiss and defer the case to arbitration. *Id.* Notably, Hill *resisted* arbitration at the trial court level on the grounds her claims did not "arise out of her employment." *Id.* The trial court, *after considering oral arguments* on Hills defense to the scope of the arbitration agreement, found that all of her claims arose out of her employment with Hilliard Lyons and compelled her to arbitrate. *Id.*

On appeal, the Kentucky appeals court cogently distinguished Hill's claims against her employer for sexual harassment, retaliation, and violation of equal pay laws from Hill's claims against Brab for the sexual assault. The claims against the employer were found to "arise out of her employment" and were compelled to arbitration, while the claims against the employee for sexual assault were reinstated in the state court action. *Id.* at 951. In other words, the *Hill* Court, resisted lumping Hill's claims against her employer with the sexual assault claim against her co-worker and treated the separate claims on their own merit. This, Captain D's submits, underscores a point of error in the original opinion of the Court, which on more than one occasion inaccurately treated Smith's claims against Captain D's as a "sexual assault claim," when, unquestionably, Smith made no such claim against Captain D's.

IV. The Nature of Smith's Claims Were Misapprehended Because of Insufficient Facts Before the Court

Though Captain D's submits Smith has waived any right to challenge the scope of the arbitration agreement, the law requires that, even when the scope of the arbitration agreement is placed in doubt, the presumption in favor of arbitration can be overcome only with "clear *evidence* that the parties did not intend the claim to be arbitrable." *Harvey v. Joyce*, 199 F.3d 790, 793 (5th Cir.2000) (emphasis added) (citing *Moses H. Cone Memorial Hosp. v. Mercury Const.*, 460 U.S. 1, 24-25, 103 S. Ct. 927, 74 L. Ed.2d 765 (1983)). Without rehashing Smith's waiver of any challenge to the scope of the subject arbitration language, evidence in the form of facts are required to decide the issue, as Justice Dickinson's dissent correctly appraises.

The flip-side of Smith not contending that her claims against Captain D's do not arise out of or relate to her employment is that Captain D's was never afforded the opportunity to counter that attack and to make a record of it, resulting in something of an "appeal by ambush." *See generally Melendez v. Exxon Corp.*, 998 S.W.2d 266, 282 (Tex. App. 1999). At the trial court level and on appeal, Smith was effectively permitted to silence the facts and evidence demonstrating that her claims against Captain D's are inextricably related to her employment yet, at the same time, successfully challenge arbitration. Smith has been licensed to now go before a jury and present those same facts and that same evidence which, if they had been before the trial court or this Court in the first instance, would subject her claims to arbitration—*and there is no doubt that she will.* This is an

injustice to Captain D's and an affront to the FAA's stated preference in favor of arbitration.

Captain D's makes the following proffer of what the factual allegations would demonstrate concerning the central basis for Smith's claims against Captain D's:

> On February 18, 2004, Tammy Smith clocked in to work at the Corinth, Mississippi, Captain D's restaurant at or about 10:07 a.m.
>
> Two other Captain D's employees were at work as well—Christopher Howell (Smith's manager) and a cook.
>
> Smith clocked off of work that day at or about 5:09 p.m, working approximately 7 hours.
>
> Smith claims that during the morning of February 18th she had a sexual encounter with Howell in one of the restaurant bathrooms. According to one account Smith gave, Howell first asked Smith if she wanted to keep her job, and Howell then proceeded into the men's bathroom with Smith following behind him a few minutes later. Smith gave a second account to a Captain D's employee that she went into the ladies' bathroom and Howell came in while she was there. Smith gave a third account that Howell directed her to go into the ladies' bathroom and she complied. Regardless of which account is believed, Smith is consistent in her claim that these events occurred while she was on the job and working under the supervision and direction of Howell.
>
> Smith claims she had sex with Howell in the Captain D's bathroom because Howell allegedly told her she had to have sex with him in

> order to keep her job, and she felt compelled to do so for that reason.
>
> Smith claims that Captain D's negligently hired Howell and negligently allowed Howell to remain in a managerial role over Smith, asserting that Captain D's knew or should have known of Howell's propensity toward this sort of behavior.

Captain D's emphasizes that it denies liability and that these facts have not been weighed by the final arbiter of this case for credibility—only that these factual allegations form the basis of Smith's claims that Captain D's negligently placed Howell in a position of authority over her and negligently placed Smith under his direction, control and command while in Captain D's employment. Smith does not claim she was raped while a customer at Captain D's and by mere coincidence happened also to be an employee. Indeed, the duties she claims Captain D's owed to her were not as an invitee but as an employee. For a final time, recall her counsel's characterization that "[b]ut for the intentional tort exclusion, this case would fall under the Workers' Compensation Act." Even Smith acknowledged that, at a minimum, her dispute with Captain D's "touched" matters concerning her employment.

Indeed, the notion of rape shocks the senses, but in this search for the truth, the emotionally-charged claim of rape must be divorced from the separate legal basis for Smith's claims against Captain D's, which deserve separate treatment.

V. Conclusion

Wherefore, first and foremost, Captain D's submits there existed no case or controversy before this Court

regarding the scope of the subject arbitration agreement. Smith, as the party resisting arbitration, had the burden of raising and proving applicable defenses to arbitration. She never asserted at the trial level or on appeal that her claims against Captain D's did not fall within the substantive scope of the subject agreement. Smith, in fact, took the position before the trial court that her claim "arose out of and in the course of' her employment with Captain D's, eliminating any doubt that her claims touched on matters concerning her employment. The procedural bar should have precluded any consideration of this issue.

Moreover, Captain D's respectfully submits that even if the scope of the arbitration agreement was placed in doubt, it was error to relieve Smith of her burden of proving with "clear evidence" that her claims against Captain D's do not "touch" on matters concerning her employment. Because no facts were presented by Smith, it was a violation of the FAA and case law interpreting it for the Court to conclude as a matter of law that the subject scope of arbitration was narrower than Smith's claims.

Captain D's urges this Court to reconsider its original opinion and, because there was a valid, binding agreement to arbitrate, enter a ruling which affirms the decision of the Circuit Court of Alcorn County, Mississippi. Alternatively, Captain D's seeks remand for an evidentiary hearing on the question of whether Smith's claims against Captain D's fall within the scope of agreement to arbitrate.

RESPECTFULLY SUBMITTED, THIS, the 5th day of July, 2007.

CAPTAIN D'S, LLC

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CERTIFICATE OF SERVICE

I, Bradley F. Hathaway, attorney of record for Defendant/Appellee herein, do hereby certify that I have this day served via *U.S. Mail* a true and correct copy of the above and foregoing document to:

Honorable Sharion Aycock
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THIS, the 5th day of July, 2007.

/s/ Bradley F. Hathaway
BRADLEY F. HATHAWAY